McLean Trucking Company *and* Carl D. Daniels. Case 9-CA-15063

May 10, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On November 20, 1981, Administrative Law Judge Thomas F. Howder issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs,[1] and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, McLean Trucking Company, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act."

2. Substitute the following for paragraph 2(a):

"(a) Offer Carl D. Daniels immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole, in the manner set forth in the section of this Decision entitled 'The Remedy,' for any loss of earnings he may have suffered by reason for his unlawful discharge."

3. Substitute the attached notice for that of the Administrative Law Judge.

[1] Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] In adopting the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging Carl Daniels, we rely on the following. Under *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the General Counsel has made a *prima facie* showing sufficient to support the inference that protected activities were a motivating factor in Respondent's decision to discharge Daniels. The Administrative Law Judge's Decision fully sets forth Daniels' grievance filing and other protected activities, Respondent's animosity toward him because of these activities, the timing of the discharge, and other acts which more than adequately comprise a *prima facie* case for the General Counsel. This evidence effectively shifted the burden to Respondent to demonstrate that it would have taken the same action even in the absence of protected activity. With regard to Respondent's burden, the Administrative Law Judge implicitly credited Daniels' testimony that Respondent's stated reason for discharging him was four disciplinary letters. These letters were presented at Daniels' discharge hearing on October 9, 1979. Two of them related to productivity, but because Respondent had no established productivity standards, the union representatives objected to consideration of these letters. Thus, they were not considered. The other two letters concerned company parking violations. These violations do not adequately rebut the General Counsel's *prima facie* case, particularly in the absence of evidence that other employees were discharged for such relatively minor offenses. Furthermore, Respondent at each proceeding involving Daniels' discharge has offered different reasons as to why he was discharged. For instance, at the grievance proceeding held by the state panel after Daniels filed a grievance to protest his discharge, Respondent for the first time contended that one of Daniels' parking violations caused a work stoppage. In the instant proceeding, Respondent contends that Daniels was discharged for 6 years of misconduct. These defenses are clearly afterthoughts. Such shifting of defenses indicates that Daniels was discharged unlawfully. See *Taft Broadcasting Company*, 238 NLRB 588, 589 (1978). Accordingly, we affirm the conclusion of the Administrative Law Judge that Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging Daniels. In view of this analysis, Respondent's asserted reasons were clearly pretextual, and Member Jenkins therefore finds that *Wright Line, supra*, has no application to this case. In addition, Member Jenkins would compute interest due in accordance with the formula set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

As evidence of Daniels' engaging in protected concerted activities, the Administrative Law Judge stated that Daniels filed claims for unemployment benefits. Chairman Van de Water and Member Hunter find it unnecessary to rely on such evidence in finding that the General Counsel made out a *prima facie* case.

As regards the grievance proceeding before the state panel, we note that even though said panel upheld the discharge, we do not reach the issue of whether the Board should defer under *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), because Respondent failed to raise it.

[4] In par. 1(b) of his recommended Order, the Administrative Law Judge included a broad cease-and-desist order against Respondent. We find it unnecessary to impose such a broad order against Respondent. As the General Counsel has not demonstrated that Respondent has a proclivity to violate the Act, or that Respondent has engaged in such widespread or egregious misconduct as to demonstrate a general disregard for employees' fundamental statutory rights, a broad order is not warranted here. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). Accordingly, we will modify the Administrative Law Judge's recommended Order by substituting narrow cease-and-desist language for the broad language used by the Administrative Law Judge. There is no need to similarly modify the Administrative Law Judge's notice, since it already contains narrow cease-and-desist language.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT fire you, because you joined, helped or supported Truck Drivers, Chauffeurs and Helpers Local Union No. 100, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by the National Labor Relations Act.

WE WILL immediately offer to take Carl D. Daniels back to work for us at his old job or, if that job no longer exists, at a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and WE WILL pay Carl D. Daniels any wages he lost because we fired him, plus interest.

MCLEAN TRUCKING COMPANY

DECISION

STATEMENT OF THE CASE

THOMAS F. HOWDER, Administrative Law Judge: This case was heard in Cincinnati, Ohio, on November 17 and 18, 1980. The complaint was filed on May 1, 1980, and charges that Respondent McLean Trucking Company violated Section 8(a)(1) and (3) of the National Labor Relations Act (hereinafter the Act), by discharging its employee Carl D. Daniels, the Charging Party herein. The complaint alleges that Respondent discharged Daniels because he joined, supported, or assisted his Union and/or engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and that Respondent's aim was to discourage employees from engaging in such activities or other concerted activities for that purpose.

Respondent denies the allegations of the complaint and maintains that the discharge of Daniels was the result of his poor work during his employment with Respondent.

All parties were given full opportunity to participate in the hearings by introducing evidence, and examining and cross-examining witnesses. Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

By its answer, Respondent admits jurisdiction. Respondent is a North Carolina corporation, with an office and place of business in Cincinnati, Ohio, and has been engaged in the interstate transportation of freight and commodities. During the 12-month period prior to issuance of the complaint, Respondent derived gross revenues in excess of $50,000 in the course and conduct of its business for the transportation of freight and commodities from the State of Ohio directly to points outside that State. At all times material herein, Respondent is, and has been an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

Respondent also admitted in its answer that Truck Drivers, Chauffeurs and Helpers Local Union No. 100, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter the Union), is now, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

III. THE RESPONDENT

In addition, Respondent admitted in its answer that at all times material herein, the persons listed below occupied the positions set forth opposite their names, and are now, or have been, supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act: Jack Carter, labor relations director; James A. Jones, terminal manager (until October 1, 1979) and district manager (October 1, 1979, to present); James M. Stopp, terminal manager (October 1, 1979, to present); Larry G. Pullen, assistant terminal manager; Tom Johnson, dock supervisor.

IV. BACKGROUND; CHARGING PARTY'S UNION ACTIVITY; ALLEGED 8(A)(1) AND (3) VIOLATIONS

Complainant Carl D. Daniels began his employment with McLean Trucking Company in September 1973.[1]

[1] Daniels revealed at the commencement of his testimony that his legal name is Ralph Wood. He applied for his job at McLean under the name of Daniels because he had been unable to obtain employment under his real name due to certain prior felony convictions. Respondent was unaware of these matters until the date of the hearing.

He was employed as a dockworker, loading and unloading truck trailers at Respondent's Cincinnati, Ohio, terminal. While so employed, Daniels became involved with an organization known as Teamsters for a Democratic Union (hereinafter TDU). He served as co-chairman of the TDU Cincinnati Chapter since 1978. Daniels solicited memberships for TDU among Respondent's employees and organized meetings for this organization. He distributed the TDU publication "Convoy" at various trucking terminals throughout Cincinnati, including Respondent's terminal. Some of the articles in this publication raised questions concerning the legality of certain practices employed by Respondent, including activities at its Cincinnati terminals.

In addition to his TDU activities, Daniels was very active in pursuing grievances alleging violations by Respondent of its contract with the Union. During the course of his employment, Daniels filed approximately 67 grievances against Respondent (Jt. Exhs. 2(a)–2(ooo)). He had some success in these filings. For example, in 1977 he was awarded 2 days' backpay by the local grievance panel for a 3-day suspension imposed on him by Respondent. Also in 1977, as the result of a settlement of a grievance that Daniels had filed concerning a 7-day suspension, he was given 6 weeks' backpay.

In addition to his own considerable grievance-filing activities, Daniels rendered assistance to other employees of Respondent in filing grievances. On a number of occasions he wrote grievances for individual employees at their request. In fact, there was testimony that some employees sought out Daniels, rather than the union steward, to assist them in filing grievances.

Daniels also engaged in the protected concerted activity of filing claims with the Ohio Bureau of Employment Services for benefits covering layoff periods. He filed six such claims and was successful in four instances, with one claim pending resolution at the time of hearing. In addition to being successful in obtaining unemployment benefits for himself, Daniels also advised other employees regarding their legal rights to unemployment benefits, and the procedure necessary to process those claims. It should be noted that Respondent opposed Daniels' claims for unemployment benefits.

Daniels testified that, in the course of his employment with McLean, various statements were made by supervisory personnel which reveal animosity toward him because of his union activities.

Early in 1977, Daniels and employee Mike Allen were processing a grievance involving call-in times for 10-percenter employees.[2] Ron Williams was the terminal manager at the time. In the processing of this grievance, according to Daniels, he made the statement to Williams that, as the grievance procedure was not going to result in justice for 10-percenter employees, the only alternative would be to get better organized. Daniels testified that Williams became outraged and responded to the effect that Daniels would not be permitted to do that kind of thing. On another occasion, during a conversation about obtaining justice for 10-percenter employees, Daniels claimed he was told by Williams that he would never get a regular shift as long as he was the terminal manager. Williams denied making such statements.

During the summer of 1977, Daniels brought a grievance to Larry Pullen, assistant terminal manager, to obtain Pullen's signature on the document, which would thereby acknowledge its receipt. Daniels testified that Pullen told him that Pullen was going to find a way to get rid of him because he filed too many grievances; and that Pullen also stated that "grievance hearings would not have to be held but every three months if it wasn't for grievances that I'd filed, that I'd filed too many grievances" Daniels testified that on many other occasions, Pullen expressed hostility towards his grievance-filing activities by refusing to sign the grievances to acknowledge receipt. Pullen denied that he made these statements.

In November 1978, Daniels allegedly had a conversation with then Terminal Manager Benny Keen. Complainant stated that during this conversation, Keen told him that Respondent was a big company, they had ways to get rid of people like Daniels, and that the Company could "load me up with people." Daniels understood this to mean that Respondent could put disciplinary letters in an individual's file in response to his having filed grievances, and that "they can call a hearing whether they're justified or not." Daniels also testified that in December 1978, on the occasion of being sent home from work as a result of a dispute over whether he was wearing proper safety shoes, Keen told him that he need not file a grievance because Keen had the votes to get rid of the complainant at the grievance panel. Keen denied that these conversations took place.

There was other testimony offered on complainant's behalf as to statements made to other employees concerning Daniel's union activities.

On one occasion during the time Keen was Respondent's terminal manager, employee Michael Allen testified he attempted to file some grievances with Keen. According to this witness, Keen brought up Daniels' name and asked Allen if Daniels was "some kind of fanatic" about filing grievances. On another occasion, according to Allen, he was told by Pullen that he had been in the top 10 percent of the terminal's employees, but that he had gone to the bottom 10 percent because he had been "hanging around with Mr. Daniels" and another employee, Gene Smith. In addition, employee Jeremy Bender testified that he attended a disciplinary hearing sometime in 1977, at which Keen was present representing Respondent. At one point, according to this witness, Keen asked Bender if he thought he was a union activist, like

[2] This category of employee was described by Daniels as follows:

> In very brief form, in a trucking company ninety percent of employees are guaranteed a shift or a forty hour work week. The bottom ten percent of the employees on the seniority scale are still full-time employees but they are not guaranteed any particular starting time or they're not guaranteed forty hours. In other words, you can be called in to work at any time. They may call you at midnight today and they may call you at 7:00 o'clock the next day or—I'm sure you see the drift of it.
>
> About ten percent of the employees have no regular starting times or quitting times.

Daniels. As stated above, Respondent's supervisors uniformly denied that these incidents occurred.

On October 8, the day before he was discharged, Daniels was elected union steward at the McLean Cincinnati terminal. Employee Donald Frietch was assisting in the counting of the ballots. Pullen, who at that time was assistant terminal manager, was present. Frietch testified that Pullen was obviously upset by the way the balloting was going and that he made several remarks, when ballots for Daniels were counted, which were derogatory of those employees who had voted for Daniels. After the ballot tabulation was concluded, Frietch testified that he remained in the break room. According to this witness, Pullen (with his back to Freitch) remarked to the union officials who were present, including the defeated union steward, that they should leave the ballot box there because Respondent was going to have a hearing on Daniels and discharge him the next day. Pullen denied that this occurred.

Respondent presented a far different account of its reasons for dismissing Daniels. It points to a long list of warning letters, suspensions, and a prior attempt to discharge complainant.

During the approximately 6 years (73 months) that he was employed at McLean Trucking Company, complainant was on layoff status for 32 of those months and suspended for 12-1/2 days. Therefore, he worked only for approximately 36 actual months of the 6 years.

During those 36 months Daniels received 33 warning letters while serving under four different terminal managers (See Jt. Exhs. J-3 (a) through (lll)). The warning letters were issued for various asserted offenses, summarized as follows:

1. Unauthorized absence from his work place on nine different occasions.
2. Unacceptable work habits resulting in poor performance—nine occasions.
3. Failure to follow instruction—six occasions.
4. Failure to make himself available for work—three occasions.
5. No call-on show—two occasions.
6. Failure to report an injury timely—one occasion.
7. Participating in a sick-out—one occasion.
8. Parking in reserved parking—violation of company policy—one occasion.
9. Auto in unauthorized area—one occasion.

According to Respondent, complainant worked approximately 475 days in the 6-year period, and either reported late to work or left work early on 148 of those occasions (31 percent of the time). While either on layoff status or 10-percenter status, complainant was offered 158 work opportunities which he did not accept.

As a result of his many warning letters, complainant was suspended for 3 days in February 1977. However, when this matter was, grieved, the grievance panel reduced the suspension to 1 day. Then, in May 1977 (3 months later) he was suspended for 5 days, and the suspension was upheld.

According to Respondent, Daniel's performance continued to deteriorate during that year, and he was discharged on August 24, 1977. A grievance panel hearing was thereafter scheduled in October 1977, and shortly before the hearing, a settlement was reached between complainant and Respondent. The compromise agreement reinstated complainant and reduced the discharge to a 2-week suspension on the condition that complainant become a productive employee and not cause any more problems.

During 1978, the same problems continued, including unauthorized absences from his workplace, unacceptable work habits resulting in poor performance, and failure to make himself available for work. Accordingly, in November 1978 complainant was again suspended for 3 days.

Complainant resumed work in December 1978 and problems developed immediately. He was issued four warning letters in December 1978 for failure to follow instructions and failure to make himself available for work 46 percent of the time.

Subsequently, complainant was laid off between January and March 1979. He returned to work in March 1979 and problems started anew. He was issued a warning letter in May for unacceptable work habits resulting in poor performance and was suspended again in June 1979 for 5 days. He returned to work in the latter part of June and promptly received another warning letter for unacceptable work habits resulting in poor performance. During July 1979 he was on layoff, being recalled to work on July 30, 1979.

In August 1979, two more warning letters were issued to complainant and a hearing was scheduled to discuss his work record in contemplation of possible termination. The hearing was scheduled to be attended by a representative of the Respondent, the complainant, and the Local Union. This meeting was first scheduled for September 4, 1979. Since complainant happened to be on vacation at the time, the hearing was postponed. When the matter was rescheduled, complainant was not able to attend (nor did he receive proper notice), and it was finally set for October 9, 1979.

Daniels was discharged at the October 9, 1979, disciplinary hearing, at which he was represented by Union Business Agents Charles Justice and James Matheson and by Dave Bloemer, the former union steward. The Respondent was represented by Larry Pullen, who conducted the meeting, and by Operations Manager Jim Callahan.

According to complainant, four disciplinary letters issued to Daniels dated July 2, August 22, August 31, and September 21, 1979, were the basis for the Company's decision to discharge him. The actual decision to discharge was made by Terminal Manager, Jones, on the recommendation of Pullen.

The first two letters referred to above related to productivity, but because the Company had no established productivity standards, the union representatives objected to consideration of these letters. According to the complainant, they were not considered at the discharge hearing.

The August 31 letter stated that Daniels' car had been parked in a reserved parking space between midnight and 5 a.m. (Jt. Exh. 3C). Daniels admitted at the hearing that he had parked in a parking space reserved for office

personnel, but stated that Pullen had given employees oral permission to park in reserved spaces during hours when they were not occupied by the individuals for whom the spaces were reserved. This testimony was supported by employee witnesses Allen, Bender, Thornberry, and Freitch, who testified on behalf of the complainant. McLean Supervisors Keen and Pullen denied that employees were given any permission to park in reserved spaces when they were unoccupied.

The letter of September 21, concerned yet another parking violation (Jt. Exh. 3A). Daniels had come to the terminal at night to pick up his pay check (he was then on vacation), and his car had been driven into a restricted area where automobiles were not permitted. Although Daniels admitted having his car in the restricted area, he stated that he was driving it at the time, and that he wanted to leave the car where it was so he could get his paycheck without getting wet, since it was raining heavily that night. Complainant's witnesses Bender, and perhaps Allen, testified that Daniels got out of the car on the passenger side. Respondent's witness Johnson testified that Daniels exited from the the driver's side.

According to Respondent's witness Pullen, Daniels' appearance in this restricted area (close to where several employees were working) led to a work stoppage. However, according to Daniels, there was no mention of a work stoppage resulting from this incident at the October 9 hearing. In addition, none of the other employees were disciplined for stopping work on that occasion.

Daniels filed a grievance to protest his discharge of October 9, which became deadlocked at the local panel. The grievance then was heard by the state panel in Columbus, Ohio, which upheld the discharge. According to Daniels, it was at the latter hearing that Respondent first claimed that Daniels' action of September 14 (for which the September 21 letter was issued) created a work stoppage.

V. THE ISSUE

The issue in this case is whether Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, by discharging its employee, complainant Carl D. Daniels, for engaging in lawful union activity.

VI. DISCUSSION

The central question for resolution is whether Respondent's discharge of Daniels was based on poor performance, warnings, and suspensions throughout the tenure of his employment or, as the General Counsel argues, was due to resentment of the complainant's filing of grievances and his union activism, which was exacerbated by his election to the position of shop steward.

That Daniels was a union activist is not disputed. He was active on behalf of TDU, he wrote many grievances, both for himself and for others, and he filed various claims with the Ohio Bureau of Employment Services.

It is clear that the complainant's union activities constitute protected concerted activities which are protected by the Act. It is also clear that Respondent was aware of these activities, despite the denials of at least one supervisor (Jones).

However, complainant's status as an active unionist does not immunize him from discharge or discipline at the hand of Respondent. "It is established that union membership is no 'shield against discharge' [citation omitted], and that an employee may be discharged for any reason, good or bad, so long as union activity is not the basis of the discharge.'" *Betts Baking Co.* v. *N.L.R.B.*, 380 F.2d 199 (10th Cir. 1967).

Examining complainant's employment record in relation to the many statements that are attributed to Respondent's supervisors (although denied by them), it appears that the reasons cited for Daniel's discharge were not pretextual. This case, then, presents an instance where an employer may be said to have a "dual motive" in its treatment of its employee. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). In "dual motive" cases, the decision to discipline involves two factors, i.e., a legitimate business reason, and the employer's adverse reaction to employees engaging in union or other protected activities. *Id.* at 1084.

Under this test, the General Counsel must first make a *prima facie* showing that the protected activities were a motivating factor, and, once such a *prima facie* showing is established, the employer must demonstrate that its disciplinary action would have been taken in the absence of any participation in protected activities by a complainant. *Id.* at 1089.

In this case, the General Counsel has met its burden of persuading me that complainant's grievance-filing and other union activities may have been a motivating factor in Respondent's decision to discharge Daniels. Various statements of Respondent's supervisors, the timing of the discharge immediately after Daniel's election as shop steward (despite the fact that the hearing had been scheduled prior to his election), and other evidence detailed in this Decision, support the General Counsel's position.

In addition, the fact that Respondent cited different reasons at various levels in terminating Daniels is suggestive of a discriminatory motive. *Taft Broadcasting Company*, 238 NLRB 588-589 (1978); *Stoll Industries, Inc.*, 223 NLRB 51 (1976).

However, Respondent has convincingly demonstrated that complainant's overall work-performance record amply justified his discharge. It is impossible to find that Respondent's action arose out of Daniels continuing exercise of protected rights ". . . in the face of supporting and convincing evidence that the disciplinary action was one reasonably deemed warranted and appropriately taken by Respondent independently thereto . . . ." *Meijer Wholesale, Inc.*, 239 NLRB 382, 391 (1978).

Complainant's long history of absences and tardiness, prior suspensions and warnings, all demonstrate a work record that is considerably less than exemplary.

Respondent has not exaggerated complainant's weaknesses as an employee to justify his discharge. *Taft Broadcasting Co., supra.* In fact, Respondent had the opportunity to discharge Daniels at an earlier time, but refrained from doing so in response to promises on his part

that he would become a productive employee and stop causing problems.

Nevertheless, I am compelled to find in favor of complainant in this case. This is because the collective-bargaining agreement in effect between Respondent and the Union at the time of complainant's discharge provides, in pertinent part, that any warning notice to an employee does not remain in effect more than 9 months from the date of issuance. Thus, according to the understanding of Respondent's former Terminal Manager Keen, Respondent could only consider warnings issued to Daniels during the 9-month period preceding his termination, as justification for his removal. Despite the large number of warnings issued to complainant during the course of his employment, only four or five appear to be in the relevant category.

All but two of these relevant warnings concern alleged lack of productivity on the part of complainant. As heretofore noted, Respondent had no objective productivity standards in effect, and, according to complainant, these letters were not considered at the discharge hearing because of the objections of union representatives.

The other two warnings were based on alleged parking violations by Daniels, described earlier in this decision.

In my view, none of these warnings during the relevant 9 months, taken separately or together, adequately rebut the *prima facie* showing regarding complainant's participation in protected activities. Such a result may well not have been reached were complainant's overall work record allowed to be considered. I hold simply that Daniel's "offences" committed during the pertinent period were insufficiently serious when considered apart from the other blameworthy factors in this case.

CONCLUSIONS OF LAW

1. Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (3) of the Act by unlawfully discharging its employee, complainant Carl D. Daniels, for engaging in protected concerted activities under the Act.

4. The unfair labor practices engaged in by Respondent, as set forth in Conclusion of Law 3 above, affect commerce within the menaing of Section 2(6) and (7) of the Act.

5. Respondent has not engaged in any unfair labor practice not specifically found herein.

THE REMEDY

Having found that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, my order will require Respondent to cease and desist from these practices, and to take such affirmative action as is consistent with the policies of the Act. Therefore, my order will require Respondent to offer full and immediate reinstatement to Carl D. Daniels and to make him whole for any losses he may have suffered by reason of the discrimination practiced against him. Any backpay found to be due to Daniels shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and shall include interest in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). Accordingly, upon the basis of the entire record, the findings of fact, the conclusions of law, and consideration of remedy discussed above, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[3]

The Respondent, McLean Trucking Company, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees because they have engaged in protected concerted activity.

(b) In any other manner interfering with, restraining, or ceorcing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives to their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the National Labor Relations Act, as amended, or to refrain from any or all such activites.

2. Take the following affirmative action which it is found, will effectuate the policies of the National Labor Relations Act, as amended:

(a) Offer Carl D. Daniels immediate and full reinstatement to his former job, without prejudice to his seniority to other rights and privileges, and make him whole, in the manner set forth in the section of this Decision entitled "The Remedy," for any loss of earnings he may have suffered by reason of his unlawful discharge.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its premises in Cincinnati, Ohio, copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to

[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.